78-1389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-

JEFFREY G. DYAR, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PAUL H. HOLMES
Post Office Box 2055
Hattiesburg, Miss. 39401
(601) 544-4121
Counsel for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-

JEFFREY G. DYAR, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on January 2, 1979, petition for rehearing denied February 13, 1979.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is not reported. It affirmed a judgment of conviction of Petitioner for kidnapping in violation of 18 U.S.C.A. § 1201. Petitioner was tried in the District Court by a jury, and there is no opinion of that Court.

JURISDICTION

The judgment of the United States Court of Appeals was entered on January 2, 1979, petition for rehearing was denied on February 15, 1979. Jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

STATUTES, RULES AND REGULATIONS INVOLVED

The pertinent portions of 18 U.S.C.A. § 1201, of the United States Code, Federal Rules of Evidence, Rule 7 of the Federal Rules of Criminal Procedure; and Federal Rules of Criminal Procedure 404 (3)(b).

QUESTION PRESENTED

Is it an abuse of discretion for a Federal District Court to allow highly prejudicial evidence of allegedly committed crimes into a court of law other than the crime for which a defendant is indicted, thus highly prejudicing a defendant on the crime for which indicted and presenting to the jury a highly prejudicial prosecution which subsequently makes a reasonable, ordinary and prudent juror inflamed and have a tendency to find a defendant guilty, regardless of guilt or innocence of the crime for which the defendant is indicted, thus denying a defendant his right to a fair trial.

STATEMENT

This is a case arising out of the criminal prosecution of Jeffrey G. Dyar for kidnapping in violation of 18 U.S.C.A. § 1201 of the United States Code. Ray Anthony Hall, Johnny Edmond, and Jeffrey G. Dyar were convicted in the United States District Court for the Northern District of Georgia at Atlanta. The alleged victim rode in an automobile from Florida to

Georgia as "insurance" for the obtaining of money and was later supposedly held for payment of ransom by his family. The alleged victim acquiesced in every way to the arrangement of going along with the three gentlemen and made no attempt to leave the company of the three men, as evidenced by the testimony in court. At the time of the arrest of the defendants, there was no evidence that the victim had been abducted, and there were no statements by the victim to the agents that he was being held hostage.

At the trial, Cort Katker, the alleged victim, was allowed to testify as to a statement which the defendant, Jeffrey C. Dyar, is alleged to have made. The statement quoted in the Court's opinion is as follows:

> "He was talking about what would have happened to Omar, because he said they went down, and they busted into his house, and they had two machine guns. And anybody that was there would have been killed."
>
> Katker, paraphrasing Dyar.

This statement, if true, contains admissions of two crimes: burglary and possession of illegal firearms.

After trial, the three defendants were found guilty as accused and were each sentenced to a term of eight years in the Federal penitentiary. The case was appealed, and the Court of Appeals affirmed. The Court stated that the testimony of Cort Katker as to the guns and burglary were properly admitted over an objection by the defendant that such evidence was irrelevant and highly prejudicial to the defendants. The Court of Appeals refused to recognize also the circumstantial evidence in regard to whether there was a kidnapping or whether this was a plain case of extortion.

The Court of Appeals on February 26, 1979 granted a stay of the issuance of the mandate until March 17, 1979, pending notice from the Supreme Court that the defendant has filed a petition for the writ of certiorari.

ARGUMENT

For evidence of other crimes to be admitted to prove intent, the Court has established a two-pronged test in *United States* v. *Beechum,* —— F.2d —— (C.A.5 1978), portions of the text reprinted in 24 Cr.L. 2183-2185. First, the offense which is "extrinsic" to the indictment must be relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of F.R.Ev. 403. Even assuming, only for the moment, that the extrinsic offenses had some relevancy to the instant case, the purpose of the "evidence of other crimes" exception is to show that the defendant, having done certain acts with unlawful intent, is likely to have performed those same or similar acts again without lawful intent. See also *United States* v. *Wilson,* 578 F.2d 67 (C.A.5 1978). However, in the case at bar, the prosecutor is offering the "evidence of other crimes" to explain the alleged victim's conduct. This is a totally new application or extension of the previously explained exception.

In the secondary work, *Criminal Procedure Under Federal Rules,* Orfield, Lester B., §§ 26:470, et seq. (particularly § 26:481), there is no indication that evidence of other crimes may be used to explain the alleged victim's conduct. Likewise, in *McCormick, et al. on Evidence,* 2d Ed., § 190 Relevancy, pp. 447-454, ten bases for the exception are given, none of which is an

explanation for the alleged victim's conduct. Furthermore, in Cotchett and Elkind's *Federal Courtroom Evidence,* Chapter 9, Character and Habit Evidence, citing Federal Rules of Criminal Procedure 404 (3) (b), an explanation of an alleged victim's conduct is not one of the recognized exceptions.

Are the crimes of burglary and possession of illegal firearms being offered to show the design or scheme in an alleged kidnapping? These crimes are completely unrelated, even under circumstances such as these, and the Petitioner urges that this Court should recognize these distinctions judicially. Because of the apparent differences between these offenses, it is difficult to find any reason for their relevancy. Thus, lacking the use of this type of evidence for its proper and approved purposes, and lacking relevancy, what other probative value would it have that would outweigh the obviously harmful and prejudicial effects on the defense of the defendant, Jeffrey G. Dyar? Of course, it is difficult from our standpoint to determine what effect this one particular statement had upon the minds of the jurors. However, to say that this particular statement was in and of itself harmless is presuming quite a bit, especially in the light that the freedom of this defendant depends upon this Court's review of what took place at trial. After all, it is quite likely that the jurors decided that, if this defendant had committed burglary or had in his possession illegal firearms, it was likely that he also intended to commit kidnapping. Unfortunately, this attempt at logic results in a non sequitur, and the jury may well have been influenced by this particular statement. In light of these apparently disjunctive rulings, there needs to be a clarification of the circumstances under which the exception to the rule excluding testimony as to other crimes will be allowed.

The ultimate issue in the instant case is whether or not an actual kidnapping took place or was the sequence of events planned so as to look like a kidnapping to convince Omar Lynch to return the money he had been advanced or to complete the deal he had allegedly made with the defendants. The affirmation of the trial court's decision by the Fifth Circuit is based largely, according to the record, on the panel's belief that much of the error that was committed at the trial level was indeed harmless error, there being sufficient other evidence before the Court to allow the conviction. In analyzing the opinion handed down January 2, 1979, it is obvious that the portion of that opinion designated by West Publishing Company as Holding No. 3 is the crux of the decision. Challenging the right of the Court to reach this decision, defendant Hall raised the question of whether or not the search and seizure pursuant to that search was legal. While the Court apparently states that search would be illegal under the principle stated in *United States* v. *Bowdach,* 561 F.2d 1160 (C.A.5 1977), as there was no necessity to make such a search at the time it was conducted, yet the Court fails to hold said search and seizure illegal based on the *Bowdach* decision alone. Also, the "consent" to search the home is called into question, as the agents in charge failed to follow ideal procedure in obtaining "consent".

However, the significance of all of this is that the panel decided that the admission of these questionable acts were merely harmless error and certainly not the basis for the jury's decision. Although not directly stated in the opinion, the inference is made due to the number of references to the Code-a-Phone telephone recording device, and the record is clear that the transcript of the recorded telephone messages in this re-

cording device played a major part in the conviction of all three defendants. To hold that this seizure was harmless error presumes, of course, that the prosecution could have proven its case beyond any reasonable doubt without these materials. Unquestionably, this is a rather broad assumption which, if standing alone, may be insufficient to be the basis for review of the panel's opinion. However, when this evidence is coupled with the statement that the alleged victim was allowed to make about other crimes which the defendant, Jeffrey G. Dyar, had allegedly committed, and which was admitted into evidence, it strains the imagination somewhat to believe that the addition of more "harmless error" would not have had some influence on the minds of the jurors. The primary point is that, while some harmless error must be tolerated, since the defendant is not entitled to a perfect trial, only to a fair trial, when harmless error begins to accumulate, the point at which the Court can view the entire trial as fair begins to be obscured behind the cloud of issues raised by much "harmless" evidence.

CONCLUSION

The Court should review this case, because of the importance of our evidentiary rules which require the strict adherence to such rules, and when this rigid standard is diminished, so will be the law. For these reasons, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

PAUL H. HOLMES
226 West Pine Street
Post Office Box 2055
Hattiesburg, Miss. 39401
(601) 544-4121

Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

February 26, 1979

Mr. Charles R. Smith
Attorney at Law
2334 National Bank of
Georgia Bldg.
Atlanta, GA 30303

Mr. Paul H. Holmes
Attorney at Law
P. O. Box 2055
Hattiesburg, MS 39401

No. 76-3634

U.S.A. v. RAY ANTHONY HALL, ET AL.

MANDATE STAYED TO AND INCLUDING 3/17/79

(SEE ORDER ENCLOSED)

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of ceritiorari, and therefore will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

EDWARD W. WADSWORTH, Clerk
/s/ By BRENDA HAUCK
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3634

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

versus

RAY ANTHONY HALL, JOHNNY EDMOND and JEFFREY G. DYAR, *Defendants-Appellants.*

Appeals from the United States District Court for the Northern District of Georgia

ORDER

(FILED FEBRUARY 26, 1979)

( ) The motion of ..... for stay of the issuance of the mandate pending petion for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

(✓) The motion of APPELLANTS, Ray Anthony Hall & Jeffrey G. Dyar for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including MARCH 17, 1979, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion for a further stay of the issuance of the mandate is GRANTED to and including ....., under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion for a further stay of the issuance of the mandate is DENIED.

/s/ WARREN L. JONES
Warren L. Jones
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

(Caption omitted in printing)

Jan. 2, 1979

Appeals from the United States District Court for the Northern District of Georgia.

Before JONES, GODBOLD and GEE, *Circuit Judges.*

JONES, *Circuit Judge:*

The appellants were charged and convicted of kidnapping in violation of 18 U.S.C.A. § 1201.[1] On Sunday, April 11, 1976 at approximately 7:30 P.M., William Court Katker, III, (herein called Court) age twenty, left his apartment in

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[1] (a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when:

(1) the person is willfully transported in interstate or foreign commerce;

(2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 101(32) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(32); or

(4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title,

Shall be punished by imprisonment for any term of years or for life.

(b) With respect to subsection (a)(1), above, the failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce.

Miami Lakes, Florida to bring his little brother, John home for dinner. At this time, Court was wearing his tennis outfit. While on his way to find his brother, Court saw a blue two-door Cadillac in the parking lot in front of his apartment. The occupants of this car were appellants Johnny Edmond, Ray Anthony Hall and Jeffrey G. Dyar. The passengers in the car asked Court if he knew Barry Yanks, Jimmy Morton and Vance Katker. The passengers in the car then asked Court if he had the Miami "yellow pages" and Court replied that he did. He returned to his apartment to obtain the yellow pages. He found the yellow pages and went back to the parking lot. While trying to locate, in the yellow pages, the name of the liquor store where Barry Yanks worked, Court was pushed into the back seat of the car. After Court was in the car, the appellants asked Court to show them the way to Interstate Highway 95 North. The

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(c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

(d) Whoever attempts to violate subsection (a)(4) shall be punished by imprisonment for not more than twenty years.

(e) If the victim of an offense under subsection (a) is an internationally protected person, the United States may exercise jurisdiction over the offense if the alleged offender is present within the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender. As used in this subsection, the United States includes all areas under the jurisdiction of the United States including any of the places within the provisions of sections 5 and 7 of this title and section 101(34) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(34)).

(f) In the course of enforcement of subsection (a)(4) and any other sections prohibiting a conspiracy or attempt to violate subsection (a)(4), the Attorney General may request assistance from any Federal, State, or local agency, including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding. 18 U.S.C.A. § 1201.

appellants told Court not to worry about anything. The car was driven to the Florida Turnpike and then to Atlanta, Georgia. While in the car, Court was told that a man named Omar had "ripped-off" the appellants for approximately $13,250 which they intended to use for the purchase of fifty pounds of marijuana and that the appellants were going to use Court as an "insurance policy." En route to Atlanta Hall was driving the car, Dyar was seated in the right front seat, Court was seated behind Dyar and Edmond was seated behind the driver. During this trip to Atlanta, the car stopped for gasoline twice and Court made no attempt to escape or seek help.

At approximately 6:30 A.M. on April 12, 1976, the car arrived at appellant Hall's house in Atlanta. Once inside the house, the appellants discussed getting money from Omar. After this discussion, the appellants and Court left the house to make a telephone call from a public booth. Court called his brother Vance in Florida to urge obtaining money. Court tolda his brother that he was being held, and that he did not know where he was or the identity of his captors. Court asked his brother to find Omar and get him to send $14,000 to Johnny Edmond. After this call, the appellants and Court returned to the Hall residence. At this time, Court took a shower and was given a white leisure suit to wear. Dyar then told Court that Barry Yanks had called and that Yanks was going to inform the Federal Bureau of Investigation of the situation. Court then went with Hall and Dyar to make another telephone call to Court's brother who was then at Barry Yanks' apartment. This telephone call was made at approximately 11:00 A.M.; its purpose was to urge the sending of money.

Court, Hall and Dyar then went in the car to the apartment of one of Hall's friends, where the group drank some beer and watched television. Court, Hall and Dyar remained at the apartment until about 1:30 P.M. They then ran some errands, went to a barber shop and a grocery

store where Court had a coca-cola. Court and Dyar went to a pool hall where they were joined by Hall and Edmond. After a while, the four returned to the Hall residence.

After Vance had received the second telephone call from Court, he had notified his father of Court's situation and the father had called the Federal Bureau of Investigation. During the afternoon Vance received another call from an unknown person who stated that the money had to be in Atlanta by 5:00 P.M. that day. Finally, Vance received a third call in the course of which he reported that he had half of the amount demanded and the caller told him that such amount should be sent to Atlanta on a 7:00 P.M. flight. Court's mother had undertaken to raise the $14,000 which she understood had been demanded from the family. Vance had never told his mother of the original demand that the money was to be obtained from Omar.

After Court's return to the Hall residence, he took a nap. He was awakened by the appellants and told that they were going to make another telephone call. When they were about to use a telephone at a convenience store, agents of the Federal Bureau of Investigation placed them under arrest. Court was still in Hall's automobile when the arrest was made. At the trial the agent who removed Court from the car could not recall whether Court stated that he had not been abducted. At no time did Court every try to get away from the appellants. Court testified that he did not have any money or any identification and that he was wearing his tennis clothes. He admitted that he was in sympathy with the appellants because they had been "ripped off" by Omar; and that he was willing to help the appellants get their money back so that he could go home.

The appellant Hall produced evidence from Benjamin F. Robinson, Jr. that on April 12, 1976, Hall and Dyar had come to his house with Court about eleven o'clock one morning. Robinson stated that they were all drinking beer and a little whiskey and smoked a little pot. In Robinson's opinion Court was not being held against his will. Annie Mae Davenport testified that she had visited the Robinson house while Hall, Dyar and Court were present and it did not appear to her that Court was being held against his will. She testified that all present in the Robinson house were drinking. Another witness, Samuel Gardner, testified that Hall had come to his barber shop and he had noticed Court and Dyar standing outside his shop on a busy street in Atlanta. Deborah Whittaroe testified that she had seen the appellants and Court in a pool room on April 12, 1976. She stated that all of them had been playing pool together.

Such are the facts as given to the court by the appellants in their brief for the period prior to the search of the Hall dwelling.

A quarter hour, more or less, after the appellants had been arrested and their victim released, a group of FBI agents arrived at the Hall residence. Two went to the back of the house, one to the side and the others to the front door. There one of the agents knocked on the door or rang a door bell and announced, "This is the FBI—open the door." There were two doors at the front of the house. One was a metal "burglar" door and the other was a conventional wooden door. Mrs. Kathy Hall, wife of the appellant Hall, opened the inner door. She said "Wait a minute" and went back into the house. The agent, although remembering so much in such minute detail, could not recall whether Mrs. Hall went to attend her child or to attire herself in more or different clothing. She soon returned and opened the outer door.

Four agents entered the house. Two went with Mrs. Hall into the kitchen. The other two made a sweep search of the house. During the sweep search an agent saw a telephone recorder, known as a Code-a-phone, in one of the bedrooms. No other persons were in the house. An agent talked with Mrs. Hall in the kitchen. The agent testified that Mrs. Hall was told that her husband and his two companions had been

arrested and the kidnap victim released. The interrogating agent was informed that the Code-a-phone had been seen during the sweep search. She was given a *Miranda* warning and somewhat more than a black-letter text of the law of search and seizure. Her consent to a search was requested. She was told, among other things, that if she did not consent a search warrant would be procured. Mrs. Hall's mother-in-law, the mother of the appellant Hall, arrived at the house and the situation was discussed by the two women. After this conversation Mrs. Hall agreed to consent. The agent wrote out a consent for her signature. It was signed and a search was made. In addition to the Code-a-phone, the searchers found and took thirteen rounds of 30 calibre ammunition, and an empty magazine for an M-16 rifle.

After the appellants were indicted, Hall filed a motion to suppress all of the items taken from his residence on the ground that they were unlawfully seized as a result of an illegal search. After a hearing on the motion it was overruled. In the off-the-cuff statements of the district court it was said that "it seems clear that the consent was given upon the advice of the mother-in-law" and that "the court would think that very possibly such a search could be sustained even in the absence of a search warrant or the absence of consent". It is not necessary that this Court consider giving its sanction to these observations.

During the trial Court was questioned by Government counsel regarding a conversation with the appellant Dyar regarding the efforts of the appellants to obtain money from the somewhat shadowy Omar. In response to a prosecutor's question as to Dyar's statement, Court said, "He was talking about what would have happened to Omar, because he said that they went down, and they busted into his house, and they had two machine guns. And anybody that was there would have been killed."

A verdict of guilty was returned, sentence was imposed and appeals were taken. On appeal two questions were presented, whether the statement of Dyar as to what would have happened to Omar should have been admitted in evidence and whether the motion to suppress was properly overruled.

At the trial the appellants claimed that Court was a willing participant in the enterprise and hence there was no kidnapping. The district court admitted the evidence as to what might have happened if Omar's dwelling had been occupied as an explanation of why Court, who had no money, no identification and little clothing, did not attempt to escape. Evidence of other crimes, even though prejudicial, is admissible to show intent, design and knowledge. *United States v. Jackson,* 5th Cir. 1976, 536 F.2d 628; *Bruinsma v. United States,* 5th Cir. 1968, 402 F.2d 261. The evidence here was not admissible to show Court's motive in not attempting to escape when there were apparent opportunities to do so.

Court was taken in an automobile from Miami Lakes, Florida, to Atlanta, Georgia, as "insurance" for the obtaining of money from Omar. He was later held for the payment of ransom by his family. When the car, occupied by the twenty year old Court and the three appellants, crossed the Georgia-Florida line, there had been the interstate transportation of an unassenting person who was held for ransom or reward, the crime of kidnapping had been committed. 18 U.S.C.A. § 1201; *United States v. McBryar,* 5th Cir. 1977, 553 F.2d 433; *Hattaway v. United States,* 5th Cir. 1968, 399 F.2d 431. If Court thereafter with or without justifiable excuse, acquiesced in his detention and cooperated with his abductors such conduct would not have absolved them from their criminal conduct.

The search of the residence and the admission in evidence of the fruits of the search are challenged by the ap-

pellant Hall[2] as a violation of his Fourth Amendment rights.[3] The rights guaranteed by this amendment are regarded as "of the very essence of constitutional liberty". *Gouled v. United States,* 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921). The justification for the entry into the Hall residence and the sweep search, which disclosed the telephone recording device and the other personal property subsequently seized, was to determine whether there were any persons in the dwelling who were participants in the kidnapping. It is doubtful whether the entry and initial search in this case can be upheld under the principles stated in *United States v. Bowdach,* 5th Cir. 1977, 561 F.2d 1160. There it is held that officers have a right to make a quick and cursory check of a residence when they have reasonable grounds to believe that there are other persons present, inside the residence who might present a security risk, and this is true whether the arrest of the defendant was made inside or outside the residence. Such a search is allowed only when necessity requires it.

The validity of the consent search is questionable. The district court determined that the consent was the result of the advice of Hall's mother to her daughter-in-law rather than the representations of the FBI agent to the wife of the appellant. But there can be no doubt that whatever advice was given by the elder to the younger Mrs. Hall was based upon the FBI statements passed on to the elder Mrs. Hall by her daughter-in-law. It seems quite clear that there would have been no representations made to Mrs. Hall that

[2] The other appellants have no standing to raise the question. *United States v. Gramlich,* 5th Cir. 1977, 551 F.2d 1359.

[3] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S.Const. Art. IV.

a warrant would be procured if consent was refused.[4] It is doubtful that the FBI agents had any information which would permit the making of an oath or affirmation such as is required by the constitutional provision. The agents knew there were no other kidnappers in the house. They knew there was a Code-a-phone but they could not say it had any recorded tapes in it.

Nevertheless, if it was error to deny the motion to suppress and error again to admit in evidence the fruits of the warrantless search, such errors were harmless in view of the other overwhelming evidence which established guilt beyond any doubt. It follows that the judgments of conviction and sentence of all of the appellants should be and are

AFFIRMED.

GODBOLD, *Circuit Judge, dissenting:*

To me this is a close case on the merits. The federal offense of kidnapping would be complete when the state line was crossed, and Court's subsequent acquiescence would not absolve the defendants of criminal responsibility. But when Court's overall conduct, including that after the state line was crossed, is considered as circumstantial evidence of whether there was ever a kidnapping at all or whether there was an extortion scheme in which Court was a participant, the case becomes very close. Therefore, I cannot join in the palliative of harmless error[1] which insulates the entry and search from scrutiny. The officers entering the apartment knew when they entered that a quarter of an hour more or less previously and some two miles away the

[4] Mrs. Hall's testimony as to threats made by an FBI agent were not credited by the district court and are given no credence here.

[1] Harmless error beyond reasonable doubt, since constitutional issues are involved, *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

three defendants already had been arrested and Court, who was with them, had been released. The entry cannot be justified as a matter of necessity. It cannot be justified upon the right of an officer who has validly entered to make a security search of the immediate surroundings. It cannot be justified on the basis of consent, because if there was valid consent at all it was secured after the sweep search had been completed and the telephone recording device already found.

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Caption omitted in printing)

Appeals from the United States District Court for the Northern District of Georgia.

Before JONES, GODBOLD and GEE, *Circuit Judges.*

JUDGMENT

This cause came on to be heard upon the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed.

January 2, 1979

GODBOLD, *Circuit Judge, dissenting.*

Issued As Mandate:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Caption omitted in printing)

Appeals from the United States District Court for the Northern District of Georgia.

(Filed February 15, 1979)

ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

(Opinion 1-2-79, 5 Cir., 197., —— F.2d ——).

Before JONES, GODBOLD and GEE, *Circuit Judges.*

PER CURIAM:

The motion of Ray Anthony Hall to adopt the petition for rehearing en banc filed by Jeffrey G. Dyar is GRANTED.

The petitions for rehearing on behalf of Ray Anthony Hall and Jeffrey G. Dyar are DENIED, and no member of this panel nor Judge in regular active service on the court having requested that the court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petitions for rehearing en banc on behalf of Jeffrey G. Dyar and Ray Anthony Hall are DENIED.

ENTERED FOR THE COURT:

/s/ JOHN C. GODBOLD
John C. Godbold
United States Circuit Judge

Nos. 78-1389 and 78-1415

In the Supreme Court of the United States

OCTOBER TERM, 1978

JEFFREY G. DYAR, PETITIONER

v.

UNITED STATES OF AMERICA

RAY ANTHONY HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ROBERT J. ERICKSON
FRANK J. MARINE
Attorneys
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1389

JEFFREY G. DYAR, PETITIONER

v.

UNITED STATES OF AMERICA

No. 78-1415

RAY ANTHONY HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Hall Pet. App. A-1 to A-12) is reported at 587 F. 2d 177.

JURISDICTION

The judgment of the court of appeals (Hall Pet. App. A-13) was entered on January 2, 1979. Petitions for rehearing were denied on February 15, 1979 (Pet. App. A-14). The petition for a writ of certiorari in No. 78-1389 was filed on March 12, 1979, and the petition in No. 78-1415 was filed on March 15, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence of certain criminal acts not charged in the indictment was properly admitted.

2. Whether consent to a search was voluntary.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioners were convicted of kidnaping, in violation of 18 U.S.C. 1201. Petitioners were each sentenced to six years' imprisonment. The court of appeals affirmed, with one judge dissenting (Hall Pet. App. A).

The evidence at trial showed (Hall Pet. App. A-3 to A-8) that petitioners and Johnny Edmond kidnaped William Court Katker, transported him across a state line, and held him for ransom. Petitioners told Katker that a man named "Omar" owed them $13,250 and that they were going to use Katker as an "insurance policy" to ensure payment of this debt (Hall Pet. App. A-4 to A-5).

Petitioners' defense at trial was that Katker made no attempt to escape and was a willing participant in the attempt to collect from Omar, and that therefore no kidnaping took place (Hall Pet. App. A-9).

ARGUMENT

1. Petitioners contest (Dyar Pet. 4-5; Hall Pet. 10-11) the admission at trial of Katker's testimony that petitioner Dyar boasted to him that petitioners and others, armed with machine guns, had broken into Omar's house and would have killed anyone they found there (Hall Pet. App. A-9).[1] Petitioners contend

[1]The dissenting judge below did not take issue with admission of this evidence (see Hall Pet. App. A-11 to A-12).

that even if this evidence were relevant to show that Katker had reason to be afraid of petitioners and their companion, such evidence cannot be admitted to prove a witness's state of mind. They urge that evidence of criminal acts not charged in the indictment can be admitted only to show the defendants' motives or conduct.

But there is no such limitation on use of evidence of "other crimes." While such evidence is excluded as a means "to prove the character of a person in order to show that he acted in conformity therewith" (Fed. R. Evid. 404(b)), it is admissible for any "other purposes" for which it is relevant (*ibid.*; Fed. R. Evid. 402). Katker's testimony about the related crime was highly relevant to prove an element of the offense—that the victim was held against his will. See *United States* v. *Weems*, 398 F. 2d 274, 275 (4th Cir. 1968), cert. denied, 393 U.S. 1099 (1969); *Holden* v. *United States*, 388 F. 2d 240, 242 (1st Cir. 1968). Since the district court determined in its discretion that the probative value of the evidence outweighed any prejudice to petitioners, it was properly admitted.[2]

2. Petitioner Hall argues (Pet. 8-10) that a warrantless search of his residence violated the Fourth Amendment because his wife's consent to the search was coerced by federal agents, and he contends that the court below erred in applying the harmless error doctrine to admission of the fruits of the search.

Approximately 15 minutes after petitioner and his accomplices were arrested and Katker was rescued by FBI agents, the agents went to petitioner Hall's

[2]Petitioner Dyar incorrectly added the word "not" in reprinting a portion of the court of appeals' opinion. The last sentence of the second paragraph appearing at Dyar Pet. App. 11a should read: "The evidence here was admissible to show [Katker's] motive in not attempting to escape when there were apparent opportunities to do so."

house, where Katker had been held captive, to determine whether any other participants in the kidnaping were still there (Hall Pet. App. A-7 to A-8, A-10).[3] The agents had information that a telephone message recording device might be in the house (Tr. 16, 27) and that there also might be M-16 rifles (Tr. 16).

The FBI agents identified themselves, and Mrs. Hall permitted them to enter her house (Tr. 11, 13-14, 43-44). The agents explained to Mrs. Hall that her husband and two others had been arrested approximately 15 minutes earlier on kidnaping charges (Tr. 11, 15, 37-39). The agents then conducted a very brief "protective search" of the house to determine whether other participants in the kidnaping were there, and for their own security (Tr. 15-17, 33, 45). Although agents observed a telephone recording device, nothing was seized during this brief search, which took less than five minutes (Tr. 17, 45).

FBI agents then explained to Mrs. Hall that they did not have a search warrant and that she had a right not to speak with them and to refuse to consent to their further search of her house. Mrs. Hall asked what would happen if she refused to consent. The agents replied that they would leave her house, station observers outside, and "would attempt to obtain a search warrant" from a magistrate. However, the agents emphasized that only a magistrate could determine whether they were entitled to obtain a search warrant (Tr. 17-20, 34-35, 46-47, 57, 61).[4]

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[3]At the time they arrived at the house, the agents did not know whether others were involved in the kidnaping (Tr. 10, 15-16, 25-26, 40-45, 65).

[4]They denied Mrs. Hall's assertions (Tr. 71, 77) that they told her that it would be futile for her to refuse to consent to the search, and that the agents would remain in her house even if she refused consent (Tr. 19-20, 34-35, 57, 61).

About 20 minutes after the agents first entered the house, Mrs. Hall gave her written consent to the search, in which she stated that her consent was made "freely and without threats or coercion" (Tr. 20-23, 46-47). Thereafter the agents searched the house and seized a telephone recording device (Code-A-Phone) containing recorded conversations between the kidnapers and the victim's relatives, .30 caliber rifle ammunition, and a clip for an M-16 rifle (Tr. 47-50, 477).[5]

In these circumstances, Mrs. Hall voluntarily consented to the agents' search with full knowledge of her right to withold her consent. Accordingly, the seizure of the various items was lawful. See, *e.g.*, *United States* v. *Matlock*, 415 U.S. 164, 169-172 (1974); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227, 246-249 (1973); *United States* v. *Agosto*, 502 F. 2d 612, 614 (9th Cir. 1974), and cases cited.[6]

In any event, it is not necessary to address the adequacy of Mrs. Hall's consent since, as the court of appeals held (Hall Pet. App. A-11), any error in

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[5]Only the recordings were introduced at trial.

[6]Petitioner does not contest that Mrs. Hall's initial consent, allowing the agents to enter the house, permitted the brief protective search of the house in which they confirmed that a recording device was attached to the telephone. In any event, her written consent to the second search was adequate to authorize that search, and the seizure of the recording device. *United States* v. *Galante*, 547 F. 2d 733, 741-742 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977); *United States* v. *Mullens*, 536 F. 2d 997, 999-1000 (2d Cir. 1976); *Davis* v. *People of State of California*, 341 F. 2d 982, 985 (9th Cir. 1965); cf. *Brown* v. *Illinois*, 422 U.S. 590, 603-604 (1975).

admission of the taped conversations was harmless.[7] Petitioner Hall complains, however, that the court below misapplied the harmless error doctrine because instead of holding that the error was "harmless beyond a reasonable doubt" (*Chapman* v. *California*, 386 U.S. 18, 24 (1967); see also *Blackburn* v. *Cross*, 510 F. 2d 1014, 1019-1020 (5th Cir. 1975); *Vaccaro* v. *United States*, 461 F. 2d 626, 634-639 (5th Cir. 1972)), it stated that the error was harmless "in view of the other overwhelming evidence which established guilt beyond any doubt" (Hall Pet. App. A-11).

But there is no material difference in this case between these standards. Since, as the court below held, evidence other than the tapes established petitioner's guilt "beyond any doubt," the evidence contained in the tapes was simply surplusage. In these circumstances, the error in admitting the tapes, if any, could not have affected the verdict, and accordingly was "harmless beyond a reasonable doubt." *Chapman* v. *California, supra*, 386 U.S. at 24.

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[7]There is no reasonable possibility that the evidence complained of might have contributed to the conviction, since other evidence of guilt was so strong. The agents observed petitioner Hall leave his house with the kidnap victim and drive away; the agents followed them and arrested Hall while he was still holding Katker captive (Tr. 439-441).

Further, the conversations on the tapes were merely cumulative of testimony at trial by Katker's relatives as to the substance of the conversations (Tr. 310-321, 479-488).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ROBERT J. ERICKSON
FRANK J. MARINE
Attorneys

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